SUPREME COURT OF THE UNITED STATES.

No. 202.

GEORGE W. PARKS, PLAINTIFF IN ERROR,

vs.

SUMPTER TURNER AND HENRY RENSHAW, TRADING UNDER THE COMMERCIAL FIRM OF TURNER & RENSHAW.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

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[GIDEON, PRINT.]

United States circuit court, fifth circuit and eastern district of Louisiana.

TURNER & RENSHAW
vs.
GEORGE N. PARKS. } No. 1803.

Pleas and proceedings before the honorable circuit court, fifth circuit and eastern district of Louisiana, at a circuit court of the United States, in and for the fifth circuit and district aforesaid, being the April term, A. D. 1849, held at the city of New Orleans aforesaid, on the fifteenth day of May, A. D. 1849.

Be it remembered, that heretofore, to wit, on the tenth of March, (A. D. 1849,) in the year of our Lord one thousand eight hundred and forty-nine, came Messrs. Turner & Renshaw, by their attorneys J. & H. H. Strawbridge, in the clerk's office of said court, and filed a petition, which is in the words and figures following, to wit:

Petition.

To the hon. the judges of the circuit court of the United States, for the district of Louisiana.

The petition of Sumpter Turner and Henry Renshaw, citizens of the State of Louisiana, and residents of the city of New Orleans, and there trading under the commercial firm of Turner & Renshaw, respectfully shows:

That George N. Parks, a citizen of the State of Mississippi, but now temporarily in the city of New Orleans, is justly indebted to them in the sum of fifty-nine hundred and sixty-nine dollars and twenty-two cents, for this: That said Parks drew his certain promissory note, bearing date New Orleans, first of January, 1848, whereby he promised to pay, one year after date thereof, the said sum of $5969 $\frac{22}{100}$, with interest at the rate of six per cent. per annum, from the date until the final payment thereof, to his own order, which note was, by the endorsement of the said Parks, transferred to and is now held by your petitioners; but that said note was protested for non-payment, on presentation, at maturity, and that said Parks still neglects and refuses to pay the same although amicably required so to do; all which will, by said note and protest hereto, for reference and greater certainty, annexed, more fully appear.

Your petitioners therefore pray, that after the process of law, the said Parks be condemned to pay them the aforesaid sum of $5969 $\frac{22}{100}$, with six per cent. yearly thereon, from the first day of January, 1848, until final payment and costs of every nature.

And they pray for all other and general relief.

J. & H. H. STRAWBRIDGE,
Att'ys for petitioners.

876.

Copy of note.

Dolls. 5969 $\frac{23}{100}$. NEW ORLEANS, 1*st January*, 1848.

One year after date I promise to pay to the order of Geo. N. Parks, five thousand nine hundred and sixty-nine $\frac{23}{100}$ dollars, with interest at the rate of six per cent. per annum from date until paid, for value received.

GEORGE N. PARKS.

Endorsed—

GEORGE N. PARKS.

Protest.

UNITED STATES OF AMERICA,

State of Louisiana.

By this public instrument of protest be it known, that on this fourth day of January, in the year one thousand eight hundred and forty-nine, at the request of the City Bank of New Orleans, holder of the original note, whereof a true copy is on the reverse hereof written, I, Hilary Breton Cenas, a notary public in and for the city and parish of New Orleans, State of Louisiana aforesaid, duly commissioned and sworn by my deputy, A. Commandeur, made careful search and diligent inquiry for the drawer, in order to demand payment of said note, but could not find him, nor any one who would pay said note for his account.

Whereupon, I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer or maker of the said note, as against all others whom it doth or may concern, for all exchange, re-exchange, damages, costs, charges, and interest, suffered or to be suffered, for want of payment. Thus done and protested, in the presence of A. Commandeur and Michael Aime, jr., witnesses.

In testimony whereof I grant these presents, under my signature, and the impress of my seal of office, at the city of New Orleans, on the day and year first above written.

H. B. CENAS,
Notary Public.

Copy of note.

Dolls. 5969 $\frac{23}{100}$. NEW ORLEANS, 1*st January*, 1848.

One year after date I promise to pay to the order of Geo. N. Parks, five thousand nine hundred and sixty-nine $\frac{23}{100}$ dollars, with interest at the rate of six per cent. per annum from date until paid, for value received.

GEORGE N. PARKS.

Endorsed—

GEORGE N. PARKS.
TURNER & RENSHAW.

Citation.

The President of the United States of America, to the marshal of the district of Louisiana, or his lawful deputy, greeting:

SUMPTER TURNER and Henry Renshaw
vs.
GEORGE N. PARKS. } No. 1803.

Your are hereby commanded to summon George N. Parks, a citizen of the State of Mississippi, to comply with the demand of Sumpter Turner and Henry Renshaw, citizens of the State of Louisiana, contained in the petition, of which a copy accompanies this citation, or to deliver his answer to the same, in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after the service hereof, or judgment will be rendered against him by default; which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held; and that you make due return hereof on the first Monday of April, 1849.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States of America, at the city of New Orleans, in the said district of Louisiana, this 10th day of [SEAL.] March, in the year of our Lord one thousand eight hundred and *thirty*-nine, and of the independence of the United States of America the seventy-third.

ED. RANDOLPH, *Clk.*

Marshal's return.

Received this 10th day of March, A. D. 1849, and on the same day and year, served copies of the within citation, plaintiff's petition and documents annexed, on the within named George N. Parks, in the manner following, to wit, in person at the city of New Orleans.

For WM. F. WAGNER,
U. S. Marshal.
J. H. RINEHART,
D'y U. S. Marshal.

And afterwards, to wit, on the 24th day of March, A. D. 1849, the following order in this case was made in this court, which reads in these words and figures, to wit:

TURNER.

Judgment by default.

TURNER & RENSHAW
vs.
GEO. N. PARKS. } No. 1803.

On motion of plaintiff's attorney, and it appearing to the court that the process of citation herein issued has been returned served upon the

defendant, George N. Parks, and that said defendant has failed to plead or answer to plaintiff's petition within the delay allowed by law: It is ordered that judgment by default be, and the same is hereby, entered as to said defendant, George N. Parks.

And afterwards, to wit, on the 26th day of March, A. D. 1849, the following order in this case was made, which reads in these words and figures, to wit:

TURNER & RENSHAW
vs. } No. 1803.
GEO. N. PARKS.

On motion of Cole Choiseul, esq., of counsel for defendant herein, it is ordered that the judgment by default taken in this case be set aside on filing peremptory exceptions; which is accordingly done.

Exceptions.

U. S. circuit court, district of Louisiana.

TURNER & RENSHAW
vs.
GEO. N. PARKS.

The defendant in this suit comes into court, and for exception to the petition of plaintiff, says, that he cannot be compelled to answer thereunto, but that the same should be dismissed on the following grounds, to wit:

1st. The want of jurisdiction of this court, there being in said petition no averment of citizenship of either plaintiffs or defendants.

2d. That the name of the defendant is not set down in full.

This defendant therefore prays that this suit be dismissed at plaintiff's cost, and for all other and general relief, &c.

C. DE CHOISEUL, *Att'y for defen't.*

And afterwards, to wit, at the December term, A. D. 1848, on the 2d day of April, A. D. 1849, the following order was entered upon the minutes of said court, which reads in these words and figures, to wit:

TURNER & RENSHAW
vs. } No. 1803.
GEORGE N. PARKS.

On motion of J. & H. H. Strawbridge, esq'rs, of counsel for plaintiffs, showing that the defendant has, after default duly taken, filed a document styled a peremptory exception, founded on law, but which is in truth a mere dilatory exception; the court considering that the first ground thereof is incorrect in point of fact, and the second also unfounded, and that the exception is merely a dilatory and frivolous one and filed too late. Ordered that the same be dismissed and rejected, the default re-instated, and the defendant ordered to file his answer within twenty-four hours.

And afterwards, to wit, on the 3d day of April, A. D. 1849, the following order was entered upon the minutes of said court, which reads in these words and figures, to wit:

TURNER & RENSHAW
vs. } No. 1803.
GEORGE N. PARKS.

On motion of C. de Choiseul, of counsel for defendant, upon suggesting to the court that the order dismissing the exception in this case obtained by plaintiff's counsel, was an ex parte proceeding, of which the defendant had no notice, and in which he had no opportunity afforded him of defending his rights; and further, that said exception was not frivolous nor dilatory, but one calculated to defeat the plaintiffs, and was improperly dismissed without notice. It is ordered by the court that the plaintiffs show cause, if any they have, on Saturday, the 14th of April instant, why the said order dismissing the exception and re-instating the judgment by default should not be revoked, and the said exception regularly tried, according to the rules of this court.

And afterwards, to wit, on the 14th day of April, A. D. 1849, the following order was entered upon the minutes of the said court, which reads in these words and figures, to wit:

TURNER & RENSHAW
vs. } No. 1803.
GEORGE N. PARKS.

The rule herein taken by defendant on the plaintiff, to show cause why the order setting aside the exceptions filed in this case should not be set aside, and the exceptions reinstated, being returnable this day, was taken up; and after argument of counsel, said rule was submitted to the court, who took the same under advisement.

And afterwards, to wit, on the 16th day of April, A. D. 1849, of the same term of said court, the following order was made and entered up, which reads in these words and figures, to wit:

TURNER & RENSHAW
vs. } No. 1803.
GEORGE N. PARKS.

The rule herein taken by the defendant having been argued and submitted to the court, on Saturday, the 14th instant, and the court having maturely considered the same, doth now order that the said rule be and the same is hereby dismissed with costs: Whereupon, on motion of defendant's counsel, it is ordered, that the judgment by default herein taken be set aside on filing his answer, which is accordingly done.

Answer.

United States circuit court, fifth circuit and district of Louisiana.

TURNER & RENSHAW
vs. } No. 1803.
GEORGE N. PARKS.

The defendant, in this case, reserving to himself all manner of benefit from the exceptions already filed by him in this case, and which have been summarily overruled by this court; and protesting against being made to answer to the merits of this case until the said exceptions have been regularly tried; under the order of this court, answers and says, that he denies all and singular, the allegations in the petition of the said plaintiffs contained, except as hereinafter admitted. And further says that the said note was given without any consideration whatsoever, and is, therefore, a "nudum pactum" and void; he, therefore, prays that he be hence dismissed with costs, and for general relief, and he prays for a trial by jury.

C. DE CHOISEUL, *Att'y for defen't.*

And afterwards, to wit, on the 14th day of May, A. D. 1849, the following order was entered upon the minutes of said court, which reads in the words and figures, to wit:

TURNER & RENSHAW
vs.
GEORGE N. PARKS. } No. 1803.

The trial of this case being assigned for this day was taken up, H. H. Strawbridge, esq., appeared for plaintiffs, the defendant and his counsel being absent. The following jury were sworn and empannelled to try the issue joined herein between the parties, to wit, B. F. Burgess, W. A. Dunlap, Mortimer Belly, J. Delpit, H. R. Wood, R. W. Galwaith, G. W. Babcock, T. S. Crane, Jno. Johnson, G. A. Wheeler, W. F. Mayo, H. A. Norcross; and after evidence being adduced, and argument of counsel, H. R. Wood was appointed foreman of said Jury; and the said jury, after having been charged by the court, returned the following as their verdict, to wit: "We, the jury, find for the plaintiff." New Orleans, May 14th, 1849. H. R. Wood, foreman.

Whereupon it was ordered by the court that said verdict be, and the same is hereby recorded.

And afterwards, to wit, on the 15th of May, A. D. 1849, this order was entered, with the succeeding one of the same date, upon the minutes of said court, which reads in the following words and figures, to wit:

TURNER & RENSHAW
vs.
GEORGE N. PARKS. } No. 1803.

On motion of H. H. Strawbridge, of counsel for plaintiffs, and with consent of C. de Choiseul, esq., of counsel for defendants, it is ordered, that the verdict rendered herein on yesterday be opened and set aside in order to admit the defendant to make his defence, and argue the cause; whereupon the following jury were sworn and empannelled to try the issue between the parties, G. M. Pinckard, B. F. Burgess, W. A. Dunlap, G. W. Babcock, T. S. Crane, H. Collins, John Johnson,

Bernard Avegno, G. A. Wheeler, Robb Monteith, A. Montross, Joachim Kohn.

There being no testimony introduced after argument of counsel, G. M. Pinckard was appointed foreman, and the said jury, under charge from the court, retired to deliberate, and returned into court with the following as their verdict: "We, the jury, find for the plaintiff." New Orleans, 15th May, 1849. Geo. M. Pinckard, foreman.

Whereupon the court ordered that the said verdict be, and the same is hereby recorded.

TURNER & RENSHAW vs. GEORGE N. PARKS. } No. 1803.

In conformity with the prayer of the petition, and the verdict of the jury, it is ordered, adjudged, and decreed, that the plaintiffs, Turner & Renshaw, recover from the defendant, George N. Parks, the sum of five thousand nine hundred and sixty-nine dollars and twenty-two cents, with interest thereon at the rate of six per cent. per annum, from the first day of January, A. D. 1848, until final payment, and costs of every nature.

Bill of exceptions.

TURNER & RENSHAW vs. GEORGE N. PARKS. } No. 1803.

United States circuit court, fifth circuit and district of Louisiana.

Be it remembered, that on the third day of April, A. D. 1849, the defendant in this suit, by his counsel, C. de Choiseul, on the trial of this cause before a jury, asked the court to make the following charge to the jury:

1st. That the circuit courts of the United States are courts of limited jurisdiction, and that this jurisdiction must appear affirmatively.

2d. That to give jurisdiction to the circuit courts of the United States, when it is claimed that the parties are citizens of different States, there must be a distinct averment of such citizenship in the body of the declaration or petition. That the jurisdiction thus given cannot be inferred argumentatively from the averments.

3d. That the statement of citizenship in the caption of the bill, declaration, or petition, is not a sufficient averment; but that it must be made in the body of the bill, declaration, or petition.

4th. That in this case there is no proper averment of citizenship in the petition of plaintiffs to give this court jurisdiction.

5th. That there must be in the body of the declaration, bill, or petition, a distinct averment of all the facts necessary to be proven in order to enable the plaintiffs to recover.

6th. That even if the averments of citizenship had been duly made, the plaintiffs were bound to prove them; for the plaintiffs are bound to prove every material allegation in their petition.

7th. That the circuit courts of the United States are bound by the laws of the respective States where they are held.

8th. That the want of consideration having been pleaded, the plaintiffs were bound to prove it.

9th. That the question of jurisdiction is a question of fact to be decided by the jury.

And that the court refused to make the said charge; whereupon the said counsel tenders this bill of exceptions, which he prays may be signed.

The court refused to charge as above required, but did charge as follows:

1st. That the jurisdiction sufficiently appears affirmatively in the petition. That the question of the sufficiency of the allegations of citizenship had already been decided by the court in its judgment overruling the defendant's exceptions; that no issue of fact was raised, and it was not a matter for the jury.

2d. That when, in an action on a note professing on its face to have been given for value received, the consideration is denied, the defendant must show the want or failure of consideration.

THEO. H. McCALEB,
U. S. Judge.

Judgment.

TURNER & RENSHAW
vs.
GEORGE N. PARKS. } No. 1803.

In conformity with the prayer of the petition, and the verdict of the jury, it is ordered, adjudged, and decreed that the plaintiffs, Turner & Renshaw, recover from the defendant, George N. Parks, the sum of five thousand nine hundred and sixty-nine dollars and twenty-two cents, with interest thereon at the rate of six per cent. per annum from the first day of January, A. D. 1848, until final payment, and costs of every nature.

Judgment rendered 15th May, 1849.

(Signed) THEO. H. McCALEB,
U. S. Judge.

19*th May*, 1849.

Petition for writ of error.

To the hon. T. H. McCaleb, judge of the circuit court of the United States, for the eastern district of Louisiana.

The petition of George N. Parks respectfully represents, that petitioner is informed, and believes, that there is error in the proceedings and final judgment rendered against him by this court in the suit of Turner & Renshaw against this petitioner.

Wherefore petitioner prays that the annexed bond be considered, that a writ of error be granted to operate as a supersedeas to the Su-

preme Court of the United States, and that all other proceedings be had in the premises which the premises may require.

C. DE CHOISEUL, *of counsel.*

And afterwards, to wit, on the 22d day of May, A. D. 1849, of the same term of said court, the following and final order in this case was entered upon the minutes, which reads in these words and figures, to wit:

TURNER & RENSHAW
vs. } No. 1803.
GEORGE N. PARKS.

On motion of Chas. de Choiseul, esq., of counsel for defendant, *esq., of counsel for defendant*, and on filing his petition representing to the court, that the said defendant felt aggrieved at the judgment rendered herein on the 15th day of May, A. D. 1849, and prayed for a writ of error to issue, returnable to the next term of the Supreme Court of the United States. It is therefore ordered, that a writ of error be, and the same is hereby allowed to said defendants, returnable to the next term of the Supreme Court of the United States of America, on his furnishing his bond with Glendy Burke, as surety, in the penal sum of eight thousand five hundred dollars, conditioned according to law.

Certificate.

I, Edmund Randolph, clerk of the circuit court of the United States, in and for the fifth circuit and eastern district of Louisiana, do hereby certify, that the foregoing fifteen pages contain a full, faithful, true and complete transcript of the record and proceedings in the case of Turner & Renshaw vs. George N. Parks, so far as the same remain on file in said court.

In testimony whereof I have hereunto signed my name and affixed the seal of said court, at the city of New Orleans, this 2d day of August, A. D. 1849, and of the independence of the United States the 74th year.

EDMUND RANDOLPH, *Clerk.*
Pr. J. W. GURLEY, *Dep. Clerk.*

United States of America, circuit court of the United States, for the fifth circuit and eastern district of Louisiana.

I, Theodore H. McCaleb, United States judge for the eastern district of Louisiana, do hereby certify, that Edmund Randolph, whose name is signed to the above certificate, as clerk of the circuit court of the United States, for the eastern district of Louisiana, was at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

I further certify, that J. W. Gurley, who signed said Edmund Ran-

dolph's name as clerk, was at the time of signing the same the duly appointed and qualified deputy clerk of said Edmund Randolph.

Given under my hand and seal, at New Orleans, in the eastern district of Louisiana, this second day of August, A. D. 1849.

[L. S.] THEO. H. McCALEB. [SEAL.]

UNITED STATES OF AMERICA, ss.

The President of the United States, to the honorable the judges of the circuit court of the United States, in and for the fifth circuit, and holding sessions for the eastern district of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Turner and Renshaw, plaintiffs, and George N. Parks, defendant, a manifest error hath happened, to the great damage of the said Geo. N. Parks, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this twenty-second day [L. S.] of May, in the year of our Lord one thousand eight hundred and forty-nine.

ED. RANDOLPH, *Clerk.*
PR. J. W. GURLEY, *D'y Clerk*
of the United States circuit court and eastern district of Louisiana.

Filed May 22d, 1849. ED. RANDOLPH, *Clerk.*
PR. J. W. GURLEY, *D'y Clerk.*

The United States of America, to Turner and Renshaw, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein George N. Parks is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.